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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000536-001 DT 12/15/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

v.

VICTORIA L GILLIS (001)

WEBSTER CRAIG JONES

PAUL A RAMOS

MESA MUNICIPAL COURT
REMAND DESK-LCA-CCC
HON J MATIAS TAFOYA-PRESIDING JUDGE
PAUL THOMAS-COURT ADMINISTRATOR
MESA MUNICIPAL COURT
250 W 1ST AVE
MESA AZ 85210

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2010–028558.

Defendant-Appellant Victoria Gillis (Defendant) was convicted in Mesa Municipal Court of driving under the extreme influence. Defendant contends the trial court erred in denying her Motion To Suppress, which alleged the police violated her constitutional rights when they drew her blood. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

Defendant was cited for cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2), alleged to have occurred April 11, 2010. The State subsequently amended the complaint to charge driving under the extreme influence with a BAC of 0.20 or greater, A.R.S. § 28–1382(A)(1). Prior to trial, Defendant filed a Motion To Suppress that alleged the drawing of her blood violated her constitutional rights.

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At the hearing on Defendant's motion to suppress, Officer James Harvie testified he received a call on April 11, 2010, at 7:30 p.m. to investigate a possible DUI. (R.T. of Nov. 10, 2010, at 121.) He ultimately arrested Defendant for DUI at 7:50. p.m. (*Id*. at 122–23.) At 7:51 p.m., he read her the Admin Per Se advisement, and she agreed to do a blood test, so he took her to the Mesa Police Department DRE room. (*Id*. at 123.) He said the DRE room was specifically structured for DUI and DRE evaluations, and was a fairly sanitary room. (*Id*. at 124.) Mr. Palma proceeded to take Defendant's blood under the supervision of Ms. Navarro. (*Id*. at 124–25.) Mr. Palma attempted to draw blood from Defendant's right arm but Defendant complained about the pain, so Mr. Palma stopped. (*Id*. at 125–26.) Defendant asked if someone else could do the blood draw, so Ms. Navarro attempted to draw blood from Defendant's left arm. (*Id*. at 126.) Defendant again said she was in pain, so Ms. Navarro stopped the procedure. (*Id*.) Officer Harvie testified, based on his experience of observing blood draws, he did not see either Mr. Palma or Ms. Navarro doing anything unusual. (*Id*. at 126–27.) Defendant said she was not willing to proceed with the blood draw, so Officer Harvie advised her she would loose her driver's license for 12 months and they would get a search warrant to take her blood, but she still refused to give the blood draw willingly. (*Id*. at 127–28.) Officer Harvie then obtained a search warrant, and at 9:53 p.m., Ms. Navarro proceeded to take Defendant's blood from her right arm. (*Id*. at 129–30.) During that blood draw, Defendant did not complain of any pain. (*Id*. at 130, 137.) The testing of Defendant's blood showed she had a 0.286 BAC. (*Id*. at 134.)

Alicia Navarro testified she graduated from school as a phlebotomist in May 2009 and her training required her to do 200 blood draws, and by April 11, 2010, she had done about 500 blood draws. (R.T. of Nov. 9, 2010, at 3–4, 13–14, 26.) She worked for East Valley Phlebotomy Services, which had a contract to do blood draws for Mesa and Apache Junction, and for the Salt River and Fort McDonald Tribes. (*Id*. at 5.) She testified she supervised Julius Palma because he was a new hire with the company, but he had the same qualification as she did and was already a trained phlebotomist. (*Id*. at 10–11, 23.) She testified about how bruising can occur with a blood draw. (*Id*. at 9–10.) She also testified about the differences in redirecting and probing. (*Id*. at 12–13.) She testified a vein could collapse if a person were dehydrated, which would make it more difficult to draw the blood. (*Id*. at 21.) She further testified about the physical arrangement and condition of the Mesa DRE room. (*Id*. at 14–15.)

Ms. Navarro testified Mr. Palma attempted to draw Defendant's blood, but was unable to do so. (R.T. of Nov. 9, 2010, at 17.) Ms. Navarro then attempted to draw Defendant's blood from the other arm, but she too was unable to do so. (*Id*. at 18, 19–20.) After the officer obtained the search warrant, Ms. Navarro made a second attempt to draw Defendant's blood, and at 9:53 p.m., she was able to do so. (*Id*. at 16, 18–19, 30.)

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Diana Mass testified as an expert witness for Defendant, and gave her opinion that the first two blood draws and the follow-up procedure did not meet what she considered the proper standard of care. (R.T. of Nov. 9, 2010, at 43–47, 78–79.) Ms. Mass did not talk to Defendant about the third draw and did not know whether Defendant experienced any pain with the third draw, and as such had no opinion whether the third draw met what she considered the proper standard of care. (*Id*. at 52, 75, 78–79.) She said alcohol consumption can cause a person to become dehydrated. (*Id*. at 79–80.) She further acknowledged she had never done a blood draw on a person who was suspected of driving under the influence. (*Id*. at 91.)

After testimony and arguments of the attorneys, the trial court found the location of the blood draw did not violate any of Defendant's constitutional rights. (R.T. of Nov. 10, 2010, at 185–86.) It further found both Ms. Navarro and Mr. Palma were properly qualified to do blood draws. (*Id*. at 186–87.) It finally found the manner in which Defendant's blood was drawn did not violate any of Defendant's constitutional rights. (*Id*. at 187–93.) The trial court therefore denied Defendant's motion to suppress. (*Id*. at 193.) As part of the trial court's reasoning, it noted Defendant had a BAC over 0.280, which the trial court believed affected Defendant's perception and recollection of the events in question. (*Id*. at 190.)

Defendant later submitted the matter on the record. (R.T. of Nov. 17, 2010, at 196–200.) As part of that record, the parties agreed the criminalist would have testified that Defendant's BAC of 0.286 at 9:53 p.m. would have meant Defendant would have had a BAC of between 0.296 and 0.316 at 8:53 p.m. (*Id*. at 200.) The trial court therefore found Defendant guilty of driving while impaired and driving with a BAC over 0.20, and dismissed the driving with a BAC over 0.08 as a lesser-included offense. (*Id*. at 201–02.) The trial court then imposed sentence. (*Id*. at 203–09.) On November 18, 2010, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THE TAKING OF DEFENDANT'S BLOOD WAS REASONABLE.

Defendant contends the trial court abused its discretion in finding the taking of her blood was reasonable. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody,* 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez,* 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm,* 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010).

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In the present matter, the trial court found the location of the blood draw did not violate any of Defendant's constitutional rights. In *State v. May,* 210 Ariz. 452, 112 P.3d 39 (Ct. App. 2005), the court held it was reasonable for the officer to draw the defendant's blood at the scene of the stop at the back of the police car while the defendant's arm rested on the trunk of the police car. *May* at ¶¶ 7–9. In *State v. Noceo,* 223 Ariz. 222, 221 P.3d 1036 (Ct. App. 2009), the court held it was reasonable for an officer to draw a defendant's blood at the scene of the stop in the back seat of the police car. *Noceo* at ¶¶ 11–13. In the present case, the officer had Defendant's blood drawn in the DRE room of the Mesa Police Department, which was specially arranged for the taking of blood samples. The trial court therefore did not abuse its discretion in finding the location of the blood draw did not violate any of Defendant's constitutional rights.

The trial court further found both Ms. Navarro and Mr. Palma were properly qualified to do blood draws. In *May,* the court noted the officer who drew the defendant's blood had taken a 1-week course in phlebotomy and had done 150 to 200 blood draws, and found this was sufficient to qualify the officer to draw the defendant's blood. *May* at ¶ 10. In the present case, Ms. Navarro had attended a school for training in the taking of blood, and had drawn blood approximately 500 times prior to drawing Defendant's blood. Ms. Navarro testified Mr. Palma had similar experience. The trial court therefore did not abuse its discretion in finding the persons drawing Defendant's blood were qualified.

Finally, the trial court found the manner in which Defendant's blood was drawn did not violate any of Defendant's constitutional rights. In *State v. Lewis,* 115 Ariz. 530, 566 P.2d 678 (1977), the court held police may respond with reasonable force if a defendant resists a reasonable search. 115 Ariz. at 533, 566 P.2d at 681. In that case, because the defendant was trying to swallow a balloon of heroin, one officer applied a choke hold to her to keep her from swallowing, and another officer slapped her on the back to get her to open her mouth. *Id.* The dissent noted an officer applied a choke hold; the struggle went from three persons standing to lying down on a couch, and thereafter on the floor; and the process lasted between 30 seconds and 2 minutes before the defendant had to cough up the evidence. 115 Ariz. at 534, 566 P.2d at 682. The majority opinion nonetheless held the officers used no more force than was necessary, and the means used was not such that it shocked the conscience of the court. 115 Ariz. at 533, 566 P.2d at 681. And in *State v. Clary,* 196 Ariz. 610, 2 P.3d 1255 (Ct. App. 2000), after the officer obtained a search warrant and the defendant still refused to cooperate with the blood draw, it took several officers restraining the defendant on the floor in order for the phlebotomist to draw the blood sample. *Clary* at ¶ 6. The court thus "conclude[d] that section 28–1321(D)(1) clearly indicates that the legislature intended to allow the use of reasonable force to overcome resistance to execution of a search warrant for the removal of blood." *Clary* at ¶ 15. Under this case authority, the trial court correctly found the officers used reasonable force to obtain the sample of Defendant's blood.

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Defendant's claim of an unreasonable search is based largely on her own testimony. As noted by the trial court, however, Defendant's BAC at the time of the blood draw was 0.286, which is over 3½ times the legal limit for impairment. As noted by the trial court, alcohol consumption will affect a person's ability to perceive and remember, and thus discounted to an extent Defendant's testimony. (R.T. of Nov. 10, 2010, at 190.) In addressing the role of an appellate court in reviewing conflicting evidence and testimony, the Arizona Supreme Court has said the following:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Because this issue involves "an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge" rather than a "question . . . of law or logic," it is not appropriate for this Court to "substitute [its] judgment for that of the trial judge."

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in denying Defendant's Motion To Suppress.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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